IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. [redacted] 96

V. W. PETTY, ... Petitioner

vs.

MISSOURI AND ARKANSAS RAILWAY COMPANY .. Respondent

RESPONSE BRIEF AND ARGUMENT TO PETITION FOR CERTIORARI

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Counsel for [redacted]

HEADLIGHT PRINTING COMPANY, HARRISON, ARKANSAS

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Was there a federal question involved or was one necessarily involved in the decision of this case by the Supreme Court of the State of Arkansas.

If one were involved it was not by reference except that petitioner, in his motion for re-hearing, raised the question for the first time. The record discloses only one reference to what is called the Railway Labor Act and that was in the opinion of the Arkansas Supreme Court as shown by the record at page 10 as follows:

> "Our attention is called to the Railway Labor Act, enacted by Congress in 1926, as amended in 1934 and 1936, U. S. C. A., Title 46, Chapter 8, as being persuasive of the trend of times and that the rule in the Mathews case should be overruled."

Until the motion for re-hearing, this Act had never been pleaded, however, on this motion petitioner urged that the Supreme Court of the United States had determined the question and that the State Court was bound thereby. Yet, to date, respondent has not been favored with the presentation of any authority to this effect, neither has our diligent search found one.

Moore vs Illinois Central R. Co., relied upon by petitioner as decisive of the one and only question presented by this application, we urge more nearly supports the decision of the Arkansas Supreme Court that no federal question was involved. The Court below simply said that it did not care to overrule the Mathews case because it saw nothing in that holding that ran counter to any well established rule of the law of contracts, and that appellant there, petitioner here, conceded or realized that the Mathews case was against him and asked the court to overrule it on the ground that the opinion was not sound.

In construing what was alleged to be a collective agreement, entitled Missouri and Arkansas Railway Company Schedule of Rules, Rates of Pay and Working Conditions to Engineers, Firemen and Hostlers, under which petitioner alleged he was working as an engineer, the Arkansas Court applied the Arkansas law, as being the law at the time when and the place where the oral contract of employment (the only one on which petitioner could recover) was made. In other words it simply applied the Arkansas law to an Arkansas contract as this court applied the Mississippi law in the Moore case, supra.

The Arkansas Court continued:

> "But we fail to discover any evidence of any agreement on the part of appellant to serve any specified time. Hence, there was no contract that he would serve and that appellee would employ him to serve any stated time, the agreement of both being necessary to fix the time of service—and, consequently no violation of a contract by discharge of appellant before the expiration of any particular time."

This appears to be sound reasoning and has been adopted by many courts. However, insofar as the question presented here, we are not concerned with the soundness or unsoundness of this reasoning because this court in 1934 in the case of Mutual Life Insurance Company vs. Johnson, 293 U. S. 335, reiterated its comity doctrine in the following appropriate and eloquent language:

> "Without suggesting an independent preference either one way or the other we yield to the judges of Virginia, expounding a Virginia policy and adjudging its effect..... All that is here for our decision is the meaning, the tacit implications of a particular set of words, which, as experience has shown, may yield a different answer to this reader and that one..... The Summum jus of power, whatever it may be, will be subordinated at times to a benign and prudent comity..... With choice so 'balanced with doubt,' we accept as our guide the law declared by the state where the contract had its being."

Why should the Supreme Court of the United States be concerned with, or why should it grant certiorari to review a decision of the Supreme Court of any state in construing simple little contracts of employment between individuals of that state?

The Arkansas Court in rendering its decision in this case quoted the language of the Supreme Court of the State of Kentucky in L

& N. R. Co. vs. Bryant, 263 Ky. 578, 92 S. W. 2d 749, decided March 27, 1936, involving the interpretation of a contract almost identical with the one under consideration. The language of this court pointed out a simple remedy, a way to make the contracts valid. We quote:

> "If employees desire its elimination from their contracts of employment, it could easily be done by providing for definite periods of service conditioned upon ability and disposition to perform them, with optional rights in the employees to renew the contract in the absence of legal reasons against it, with corresponding obligation of the employer to abide by the option so given."

In the Moore case referred to by petitioner, the Court of Appeals specifically held that an individual employee suing on his contract of employment to enforce his individual right to recover pay for damages for discharge was not suing upon the collective agreement as a complete contract made for his benefit and referred to Yazoo and Miss. Valley Ry. Co. vs Sideboard, which case was also cited by petitioner to support the theory that a federal question was involved in the present case. The court of appeals in the Moore case continued:

> "The federal statutes above referred to speak of a collective agreement as 'an agreement concerning rates of pay, rules and working conditions'; (45 U. S. C. A. Sec. 152 (1), (6), and often, but the individual contract is referred to as 'the contract of employment between the carrier and each employee'; (45 U. S. C. A. 152 (8). The collective agreement may contain a contract between the union and the carrier as, for an open and closed shop, collection of union dues, and the like, but it is not itself a contract of employment. It binds no one to serve the carrier and binds the carrier to hire no particular person. It is only a basis agreed upon as mutually satisfactory for making contracts of employment.

> It follows clearly that when an individual employee sues for damages for a breach of his contract of employment because of a discharge contrary to the collective agreement as Moore does....., he is not suing on the written collective agreement but upon his parol contract of hiring which adopted those terms of the collective agreement which are applicable to him. Moore's contract of employment in 1933 would not be established by merely proving his written collective agreement made in 1924 by a union to which he did not belong and for a railroad for which he did not work."

If petitioner here had wanted to extend his parol agreement, or better still, had desired to enter into a written one which embodied all the essentials necessary under Arkansas law to make it binding, there was nothing to prevent his doing so.

As far as the record is concerned, petitioner is an Arkansas citizen and he was dealing with another Arkansas citizen doing intrastate business. In the Moore case, Moore was dealing with an interstate carrier, but the federal court applied the Mississippi law. Upon the same reasoning would not the Supreme Court of Arkansas be the proper tribunal to construe the parol contract by applying its rule which was in force when the oral agreement was made?

It would serve no purpose and certainly not enlighten this court to present a history of its own decisions upon the question of "Law Applicable in Federal Courts." Suffice it to say that this history has been one of dissents from Swift vs. Tyson in 1842, to Erie Ry. Co., vs Tompkins in 1938. At least, under the doctrine of the Erie case variance between **substantive** law applied in the state courts and in the federal courts in non-federal matters is reduced to a minimum. It is realized by the bar that it is difficult to determine when the border line of procedure ends and substantive law begins in some cases, however, respondent humbly suggests that the Supreme Court of the United States is not interested in individual con-

tracts of employment in the State of Arkansas. So far as the record is concerned, petitioner belongs to no organization and did not at the time of his alleged agreement. He merely alleged that he was discharged while on a list of active engineers employed by defendant and at the time of his discharge was working under an employment agreement which became effective August 1, 1935, and embodied in his complaint Sections (d) and (e) of Article 32 of the collective agreement. Since this was a collective agreement, it was not one under which petitioner could sue for damages for discharge. He would be compelled to sue upon an individual agreement which was implied. It was not even expressed as to length of service, etc. The Arkansas Supreme Court said it was unilateral and too indefinite as to form a binding agreement to work for any certain length of time; yet, petitioner would ask this court to review this judgment on certiorari urging that a federal question was necessarily involved because the Railway Labor Acts makes it the duty for all carriers and their employees TO EXERT EVERY REASONABLE EFFORT to make and maintain agreements concerning rates of pay, working conditions, etc. What these agreements are, if the employer and employee enter into them, is a matter of simple contract. They are left free as to terms, conditions and as to what will be the individual contracts of employment.

Hundreds of analogous situations could be drawn where questions, arising because of a federal law, were left to the interpretation of the several states in the determination of the effect of the federal law. One of the common examples of this and one on which the Supreme Court has had no difficulty in concluding, is the Revenue Law and its application to property rights as determined by state law. In a suit by trustees to obtain the construction of a will and to determine the validity of certain assignments affecting the relation of the revenue law to the subjects, the District Court in Commissioner vs Blair, 60 Fed. (2d) 340, made a construction that the trusts were "spendthrift." On certiorari to this court, 288 U. S. 602, it

was held that the construction of the Illinois Court should be applied. Certiorari was denied. The Trustees then went to the Superior court of Cook County, Illinois to obtain a construction of the will as well as the validity of the assignments. The opinion of the State Court was then received by the Board of Tax Appeals, where the case originated. The Board applied the state decision to determine the petitioner's tax liability. The Circuit Court of Appeals again reversed the Board and this court granted certiorari because of the conflict in decisions of the state and federal courts. Mr. Chief Justice Hughes delivered the opinion of the court in Blair vs. Commissioner, 300 U. S. 5. It was held that the validity of the assignment was a question of local law.

> "Here, after the decision in the first proceeding, the opinion and decree of the state court created a new situation. The determination of petitioner's liability for the year 1923 had been rested entirely upon the local law. The supervening division of the state court interpreting that law in direct relation to this trust cannot justly be ignored in the present proceeding, so far as it is found that the local law is determinative of any material point in the controversy. The question of the validity of the assignment is a question of local law..... By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final."

In The Alternative, The Statute Of Limitations

The Supreme Court of Arkansas said it pretermitted a decision of the question of the application of the statute of limitations which was specifically pleaded by defendant in the court below. Petitioner alleged that he was discharged December 3, 1935, and that his first action was filed in the Boone Circuit Court December 3, 1940.

SECTION 8928 POPE'S DIGEST of the Statutes of Arkansas is as follows:

> "The following actions shall be commenced within three years after the cause of action shall accrue and not thereafter.
>
> First. All actions founded upon any contract or liability expressed or implied, not in writing."

It is well-settled law that a contract is unwritten if the contract itself cannot be proven wholly by writings. The Arkansas Supreme Court has adopted this view in the construction of this statute. The applicable statute of limitations must be determined by the nature of the contract on which the pleader bases his cause of action. Sommer vs Nakdiemer, 97 Fed. (2d) 715.

As respects determination of applicable statute of limitations, the fact that plaintiff's right to recover may be evidenced in part by written instrument, does not necessarily mean that his cause of action is on an instrument in writing. Sommer vs. Nakdiemer 97 Fed. (2d) 715. This was the Eighth Circuit construing the Arkansas three year statute of limitations, reviewing the Arkansas law.

This court can now apply the Arkansas Law on the question of The Statute of Limitations.

Without a cross-petition or appeal a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision. McGoldrich vs Compagnie Generale, 309 U. S. 430 at page 434. In this opinion the court also said:

> "But it is also a settled practice of this court in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant, not pressed or passed upon in the courts below."

It is again called to the attention of this court that the question presented in the petition here was not raised in the Woodruff Circuit Court where the cause was originally heard and was not raised in the Supreme Court of Arkansas until the motion for rehearing.

Upon the rules of these cases cited it is urged that should this court grant certiorari, the Arkansas law with reference to the statute of limitations should be applied.

Conclusion

Petitioner has presented a brief, citing many authorities which respondent urges shed no light on the question raised; or, rather what respondent urges is an alleged question. In referring to the Moore case, or for that matter any other case cited, petitioner advisedly does not urge that the Supreme Court of Arkansas is not in accord with the applicable decisions of this court. The words "probably not" have been used. We would respectfully chide counsel for petitioner on the weakness of this assertion and at the same time express our respect for their frankness.

We would respectfully urge that the petition be denied and in the alternative that this court apply the Arkansas Statute of Limitations.

Respectfully submitted,

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VIRGIL D. WILLIS,

Counsel for [redacted] Respondent